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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO Great Western Railroad Company and the Kansas City Southern Railway Company, petitioners

v.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District. The opinion of the Court of Appeals (R. 199) is reported in *United States, ex rel. Chicago Great Western R. Co. et al.* v. *Int. Com. Comm. et al.*, 71 F. (2d) 336. The report of the Interstate Commerce Commission (R. 69) is reported in *Missouri-Kansas-Texas R. R. Co.* v. *Kansas City Terminal Co.*, 104 I. C. C. 203.

JURISDICTION

By petition filed May 31, 1933, the Chicago Great Western Railroad Company and The Kansas City Southern Railway Company sought from the Supreme Court of the District of Columbia a writ of mandamus to compel the Interstate Commerce Commission to vacate its order dismissing, and to forthwith consider and pass upon the merits of, petitions filed by said carriers, whereby they asked to be relieved of certain obligations under an agreement with other railroads covering the construction, maintenance, operation, use and management of the Kansas City station and freight terminals at Kansas City, Missouri, and Kansas City, Kansas. (R. 1.) The judgment of the Supreme Court of the District dismissing said petition was entered June 23, 1933. (R. 194.) Petitioners noted an appeal in open court on the same day. (R. 194.) On May 7, 1934, the Court of Appeals of the District affirmed the action of the lower court. (R. 199.) On July 28, 1934, petitioners filed petition for writ of certiorari under Section 240 (a) of the Judicial Code, as amended, and reenacted by the Act of February 13, 1925 (c. 229, 34 Stat. 936, 938) and said petition was granted by this Court October 8, 1934. (R. 215.)

QUESTIONS PRESENTED

1. Whether the Commission's action dismissing the petitioners' intervening petitions was a denial

of jurisdiction or a decision in exercise of quasi-judicial judgment and discretion, as to which mandamus was not an appropriate remedy.

2. Whether mandamus, whose chief function is to compel performance of a ministerial act unequivocally prescribed, may be asked for to review reasonable determinations of the Commission and to direct different determinations not free from doubt.

3. Whether the Commission correctly construed the law in its application to the case made?

STATUTES INVOLVED

The pertinent provisions of the applicable law, the Interstate Commerce Act, U. S. Code, Title 49, c. 1, are as follows:

> Section 1 (15): Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as

may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people upon such terms of compensation as between the carriers as they may agree upon, or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Section 3 (1): That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 3 (3): All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 3 (4): If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, in-

cluding main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Com-

mission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 15a (2), as amended by Transportation Act, 1933: In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

STATEMENT OF THE CASE

Proceedings before the Commission

The proceeding before the Commission, known as Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Com-*

pany, 104 I. C. C. 203, arose out of the construction of the Kansas City Union Station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas.

Prior to 1906, ten railroads serving Kansas City had used the so-called "union depot." The two petitioners here had used the Kansas City Southern's station, the Chicago Great Western being a tenant. The union depot was inadequate and there was a public demand for better facilities. As a result, in 1906, the ten lines organized the Kansas City Terminal Railway Company as a common carrier railroad with an authorized capitalization of 30 million, later increased to 50 million, dollars. Its directorate is composed of a representative of each of the proprietary lines. (R. 76, 104 I. C. C. 208.)

On June 12, 1909, an agreement was entered into by and between the Kansas City Terminal Railway Company, the ten lines, and the Illinois Trust and Savings Bank, as trustee. This agreement was supplemented January 24, 1910, by the inclusion of petitioners, Kansas City Southern and the Chicago Great Western, on equal terms with the original proprietary lines. These two agreements are known as the operating agreement. (Petitioner's Ex. No. 1, R. 14–59; R. 77, 104 I. C. C. 209.)

The operating agreement, the term of which is 200 years, is a mutual engagement covering the construction, maintenance, operation, use and management of the terminals, switching and other

services to be rendered the proprietaries. It may be modified only with the assent of the Terminal Company and each of the proprietary companies and the additional assent of the trustee. (R. 85, 104 I. C. C. 215.)

It provides that one-twelfth of the interest accruing on the Terminal Company's outstanding bonds of $50,000,000, and of the taxes and other governmental charges payable by the Terminal Company, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, are accounted for and assessed against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and the other lines of the respective zones. Switching services performed by the Terminal Company are at tariff rates, and such special services as are performed by it at approximately cost. Net revenues derived by the Terminal Company from concessions or other uses of the terminal facilities or property are credited monthly to the carriers not in default and in the respective proportions of their contributions.

There are further provisions that termination or suspension of any of the rights of a constituent carrier shall not affect the obligation to make the payment required, and others relating to action in case of default, etc. (R. 85, 86, 87, 104 I. C. C. 215, 216.)

Coincident with the execution of the operating agreement a stock-trust agreement was executed between the Terminal Company and the ten, now twelve, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of the Terminal Company's stock and of such further shares as should be offered to and subscribed for by those lines from time to time to the trust company, in trust for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provisions against acquisitions of such stock by outside interests. (R. 77, 104 I. C. C. 209.)

The work of construction and unification of the passenger and freight terminals in accordance with plans ultimately adopted was prosecuted and resulted in the opening for business of the new union passenger station November 1, 1914, and the making ready for use and operation the joint terminal facilities. (R. 77, 104 I. C. C. 209.) While the outlay contemplated when the project was initiated was $25,000,000, the ultimate cost was practically twice that amount. (R. 87, 89, 104 I. C. C. 217.)

The Missouri, Kansas & Texas *Railway* Company, one of the proprietary companies, party to the agreements just described, went into receivership and most of its railway lines were purchased at a judicial sale by the Missouri-Kansas-Texas *Railroad* Company. Pursuant to order of the re-

ceivership court, the purchaser was given the privilege of electing as to whether it would or would not become one of the proprietary companies as its predecessor had been. It elected not to do so and initiated proceedings before the Commission (out of which this litigation arises) by filing on March 10, 1924, a petition seeking an order under the authority of paragraph (4) of Section 3 of the Act, according to petitioner the right to use designated portions of the union passenger station and the freight terminals of the Kansas City Terminal Railway Company, at Kansas City, Missouri-Kansas. It alleged that the terms imposed upon petitioner for its use of the terminals were unjust, inequitable and burdensome in that by the operating agreement each of the proprietary lines parties to said agreement is required to pay one-twelfth of the interest and of the taxes, without regard to the extent of the use of the terminal by each such company; that as a small user of the terminal facilities, its payment for interest and taxes is out of proportion to its use. (R. 71, 104 I. C. C. 204.)

All the other users of the terminal filed petitions in intervention. Five of these, known as the larger users, opposed the relief sought; the others, small users, in which group petitioners belong, sought the same relief that the Missouri-Kansas-Texas sought, and also urged that to grant the relief to the Missouri-Kansas-Texas alone would aggravate

the situation and unlawfully discriminate against the other users. (Exs. 3 and 4, R. 61–69, also R. 74, 104 I. C. C. 206, 207.)

Hearings were had upon the issues raised by the petitioner, respondent and the interveners. A large volume of testimony was taken, including the reception by the Commission of evidence on behalf of petitioners. Subsequently, the case was orally argued before the Commission and submitted for determination. Thereafter, the Commission made and issued its report and order, dated November 10, 1925 (Petition, Ex. No. 5, R. 69–119), wherein, after a very full statement of the facts, and after setting forth the respective contentions of the parties, including the interveners, it took up consideration of the applicability to the case of paragraph (4) of Section 3 of the Interstate Commerce Act, upon which the Missouri-Kansas-Texas Railroad Company, and the other small users, including the petitioners here, based their right to relief at its hands.

Paragraph (4) of Section 3 authorizes the Commission, if found to be in the public interest and not prejudicial to the owning carrier of terminal facilities, to require the use of the terminal by another carrier or other carriers, on terms to be agreed upon between the parties, and, in case of failure to agree, the Commission is authorized to fix a just compensation on principles controlling in condemnation proceedings. If the owning carrier

is then not satisfied, it is given the right to sue in court for damages sustained because of its compliance with the order or for just compensation for the use, or both.

Concerning this statute and its applicability to the situation presented, the Commission said (R. 94, 95, Rept. pp. 222–223):

> The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.
>
> Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in ques-

tion, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

The report then took up the question of the applicability of Section 15a of the Act, insofar as it provides that the Commission shall initiate, modify or adjust reasonable rates so that the carriers as

a whole or in groups will under honest, efficient, and economical management earn a net railway operating income equal to a fair return on the aggregate value of their railway property used in transportation service.[1] Answering a contention that under that provision the Commission need only find that the operating agreement is so burdensome as to result in inefficient management, to cause misapplication by the railways involved of funds created for an entirely different purpose, and generally to impair their ability to furnish adequate service, it was said (R. 96, Rept. p. 224):

> * * * However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful

[1] Section 15a (2) was amended by Transportation Act, 1933. Both the old and new paragraphs are set out under the chapter, "Statutes Involved", *supra*, p. 3.

in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

It then passed upon the asserted violation caused by the agreement of paragraphs (1) and (3) of Section 3 of the Act and said (R. 96–97, Rept. p. 224):

> * * * Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges,

> they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

The conclusion, so far as petitioners are concerned, was (R. 97, Rept. p. 225):

> An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Such an order was entered on November 10, 1925. (R. 119).

The case upon the petition of the Missouri-Kansas-Texas was continued pending the outcome of litigation testing the question of whether it was bound by the terms of the operating agreement.[2] This was subsequently decided in favor of the Missouri-Kansas-Texas' contention that it was not so bound and thereafter the case was heard by the Commission June 1, 1933, on the question of just and reasonable compensation for its use of the terminal, the Commission having held that as to that railroad it had jurisdiction under Section 3 (4) provided it was not bound by the agreement.

In 1931, the petitioners filed petitions for a rehearing of the Commission's order dismissing their

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[2] Pending final disposition of the proceedings, the Commission issued an emergency order pursuant to paragraph (15) of Section 1 of the Act, permitting the Missouri-Kansas-Texas to use the terminals, under the terms of the operating agreement; payments thereunder not to be the final measure of compensation (R. 72).

petitions in intervention, but these were denied by the Commission on June 1, 1931. (Petition, par. (13), R. 10.)

Proceedings in Court

The petition for mandamus filed in the Supreme Court of the District on May 31, 1933, proceeds on the theory that the action of the Commission in dismissing petitioners' intervening petitions was erroneous in law and constituted a denial of a jurisdiction conferred upon it by the Interstate Commerce Act; that in refusing to exercise this asserted jurisdiction, the Commission acted arbitrarily and contrary to law and denied to petitioners their lawful rights. (Petition, pars. (16) (17), (18), R. 12.)

Petitions to intervene as parties respondent were filed by the Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and the Kansas City Terminal Railway Company (R. 163, 182); they mere allowed (R. 165, 183) and their answers were filed (R. 165, 184). At the hearing the Missouri Pacific Railroad Company was admitted as a party to the intervention filed on behalf of the Santa Fe and others. (R. 195.)

The case was heard upon the petition, answer of the Commission, the answers of the interveners, and petitioners' demurrer to said answers. The

Court overruled the demurrer, and the petitioners electing to stand upon their demurrer, judgment was entered dismissing the petition. (R. 194.) An appeal was noted, (R. 194) and, on May 7, 1934, the Court of Appeals of the District affirmed the judgment of the lower court. (R. 199.) Petition for writ of certiorari was filed in this court on July 28, 1934 (R. 215) and the writ was allowed by order dated October 8, 1934. (R. 215.)

SUMMARY OF THE ARGUMENT

1. That, in the proceedings before it, the Commission entertained the intervening petitions of petitioners and others, proceeded to hear the evidence, exhaustively considered the facts, as applicable to the law, is manifest from its report. The denial of the relief sought was just as much an exercise of jurisdiction as the awarding of the relief would have been. There was no denial by the Commission that it had jurisdiction to require the use of the terminals of one carrier by another, under Section 3 (4), or to correct a discrimination under Section 3 (1) and (3) of the Interstate Commerce Act. As to Section 3 (4), the Commission decided that petitioners, who were already established in the use of the terminal properties, were not such carriers as could apply for an order that they be permitted such use. This determination was one of judgment and discretion, not reviewable by mandamus. *General Investment Co.* v. *N. Y. Cent. R. R.* 271 U. S.

228, 230–231; *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127, 136. As to section 3 (1), the Commission, assuming for the purposes of the case that that paragraph's prohibitions against unjust discriminations were broad enough to embrace, as between the parties, a joint terminal agreement voluntarily entered into, decided that the provisions in said agreement, which were complained of, namely, the provisions for distribution among the carriers of the essentially capital charges (bond interest and taxes) on the basis of the proprietary carriers' equitable titles or interests in the terminal properties instead of on the basis of the use made of the properties, was not shown to cause undue preference or prejudice or unjust discrimination.

This determination while looking to the beneficial titles or interests in the properties held by the proprietary companies through the medium of their instrument, the terminal company, was, nevertheless a matter of judgment and discretion; and, if in any way making erroneous application of principles of law, which is not believed to be the case, such error is not reviewable by writ of mandamus. *United States ex rel. Campbell* v. *Int. Com. Comm.*, 289 U. S. 385, 393, 394. As to the requirements of Section 3 (3) for the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property without

discrimination in rates, fares and charges: the Commission's determination was that the charges under the agreement for bond interest and taxes on the terminal properties, they being "essentially capital charges, have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3)." This determination, similarly as the others, was one of judgment and discretion. *Wilbur* v. *United States,* 281 U. S. 206, and decisions above cited.

2. The relief sought by the mandamus action, namely, that petitioners who are already established in the use of said terminals as virtually coproprietors thereof under a joint terminal agreement, are entitled to an order requiring and, in effect condemning, such use on their behalf and fixing compensation therefor, or to an order declaring that their contract obligations in respect of "capital charges", as now based on their equitable interests in the terminals, unjustly discriminate against them, and fixing, in lieu thereof, the just and reasonable obligations, raises questions which are anything but free from doubt. The chief function of the writ of mandamus is to compel a ministerial act so plainly prescribed as to be a positive command, and it should not be used for purposes of review of questions which, as advanced by petitioners seeking such a writ, are of exceeding doubt, at least as resolvable in favor of their contentions. *Int.*

Com. Com. v. *N. Y., New Haven & Hartford R. R.*, 287 U. S. 178; *Wilbur* v. *United States*, 281 U. S. 206.

3. The Commission's construction of the law in its application to the facts was not only reasonable and not arbitrary, but on the contrary correct. The provisions of law involved clearly did not entitle petitioners to the relief sought before the Commission.

ARGUMENT

I

Mandamus is not an appropriate remedy in this case

In *Wilbur* v. *United States*, 281 U. S. 206, this court said, at pages 218–219:

> Mandamus is employed to compel the performance when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

In *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, this Court said:

> The principles of law relating to the remedy by *mandamus* are well settled.
>
> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the

officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.

It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error.

(Id. 533–534.)

The Commission's report shows a painstaking and thorough study and consideration of all the factors in the case. It goes fully into all the pertinent facts, discusses the status and situation of the petitioners and the other parties, details the conditions which gave rise to the new union station and the facilities connected therewith, the plan which was adopted to consummate the project, the various agreements voluntarily entered into by the railroads to insure the project, and takes up the various contentions and views of the interested parties.

The conclusion of the Commission was that a case warranting relief under the applicable law had not been made out by the intervening small users. Hence, these petitions were dismissed.

This action was firstly predicated upon the holding that the small users did not come within the purview of paragraph (4) of Section 3, which empowers the Commission under certain conditions to compel a carrier to allow the use of its terminal facilities to another carrier, since they were already using the terminal facilities under voluntary agreements while the statute contemplated

a case where use is not had but is desired and compulsion is necessary to force the unwilling terminal owner to allow use, (Report, R. 94, 95, 104 I. C. C. 222, 223). This holding was plainly on the merits being to the effect that petitioners were not such carriers as could invoke the provisions of said paragraph. In short it was a holding that petitioners did not have the requisite standing to seek the relief—a determination on the merits in exercise of jurisdiction. *Butte, A. & P. Ry.* v. *United States,* 290 U. S. 127, 142. *Abilene & Southern Ry.* v. *Interstate Commerce Commission,* 8 F. (2d) 901. Secondly, the Commission's action was predicated on the fact that there was no showing of undue prejudice or preference in violation of paragraph (1) of Section 3 caused by the provision in the agreement for distribution equally among the carriers of charges for bond interest and taxes on the terminal properties on the basis of the carriers' equal equitable titles or interests in the properties instead of on the use made thereof, because those charges are strictly capital charges.

And as to paragraph (3) of Section 3, the Commission said: "Also, as essentially capital charges, they have no relation, direct or indirect, to the ininterchange of traffic between the several lines within the contemplation of paragraph (3)". In reaching these determinations, it will be seen that the Commission looked to the equitable titles or interests in the properties as held by the proprie-

tary carriers through their instrument, the Terminal Company, but that fact does not render the determinations any the less matters of judgment, opinion and discretion; and, if it in any way erroneously applied principles of law, which we submit was not the case, mandamus does not lie to correct the error. *Wilbur* v. *United States,* 281 U. S. 206; *Campbell* v. *Int. Com. Comm.,* 289 U. S. 385, 393. In *General Investment Co.* v. *New York Central R. Co.,* 271 U. S. 228, 230, this Court said:

> * * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254, 258) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28, 34; *Venner* v. *Great Northern Ry. Co.,* 209 U. S. 24, 34. If it be resolved

against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.

Even if it had committed an error by misconstruction of the applicable law, it did not transcend its jurisdiction because jurisdiction does not depend upon a correct decision. The distinction between jurisdiction and merits is plain. Jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305, 306. By jurisdiction is meant the power to entertain a case, consider the merits and render a binding decision; by merits is meant the various elements which enter into or qualify the right to the relief sought. There may be jurisdiction and yet an absence of merits. *General Investment Co.* v. *N. Y. Central R. R., supra.*

The recent decision in *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U. S. 127, is precisely in point. There the United States sued the railroad to recover money paid to it under a certificate issued by the Commission under Section 204 of the Transportation Act, 1920, which provided for payment to carrier engaged in general transportation operating under its own management during the period of Federal control and sustaining a deficit in operating income as defined in the section. It was asserted that the certificate had been issued under an erroneous construction by the Commision, later changed, of the meaning of

"deficit", as used in the statute, and hence that the Commission had no authority to issue the certificate or the officials of the Treasury to make payment to the railway company.

Speaking of that contention the court said it had no occasion to determine which one of the Commission's interpretations of the word "deficit" was the correct one, because it was of opinion that the Government could not recover, even if the Commission had erred. It then said (p. 136):

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit", it committed an error; but it did not transcend its jurisdiction. * * *

Then, after referring to numerous questions which the Commission would have to determine in interpreting the provisions of Section 204, the Court said (p. 141):

> While Sec. 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights

asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim; thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228, 230. Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. * * *.

II

Mandamus is not available to compel determination in a particular way of questions involving the exercise of judgment and discretion, especially where the determination sought is most doubtful

Furthermore, an additional factor showing that mandamus could not be used to control the Commission's exercise of quasi-judicial judgment is that there was nothing arbitrary either in its determination that petitioners, already established in the use of the terminal, were not such carriers as could apply under Section 3 (4) for an order requiring that they be permitted that use, or in its determination that the distribution between the

carriers, of obligations for bond interest and taxes on the property, based on their equitable interests in the property itself is not

> shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3). (Report, R. 97.)

This latter determination, whether as involving law or fact, was one of judgment. As said in *Butte, Anaconda & Pacific Ry.* v. *United States,* 290 U. S. 127, 136, which has been already discussed:

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity.

The relief sought by petitioners would compel the Commission to hold that they, although already established in the use of said terminal, had the requisite standing to invoke the provisions of Section 3 (4), and would compel the Commission to

reach a different judgment and determination than that arrived at under Section 3 (1) and (3). The questions involved can hardly be said to have been free from doubt, at least as resolvable in favor of petitioners' contentions, which fact gives added support to the lower court's opinion that mandamus was not a proper remedy.

In *Wilbur* v. *United States,* 281 U. S. 206, this Court said at pages 218-219:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the

> duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

The above decision was, among others, referred to in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 287 U. S. 178, in which this Court pointed out that the duty there sought to be compelled by mandamus, namely, to value certain trackage rights under Section 19a of the Act, "has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus." At pages 203–204, the opinion reads:

> * * * For the purpose of this case, it is enough to hold, as we do, that the duty of specific valuation, if it exists, has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206. One cannot rise from a study of the statute in the setting of its history and of the administrative practice under it and hold at the end an assured belief that the Commission has been commanded by the Congress to do the act omitted. Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, "it is regarded as involving

the character of judgment or discretion," (*Wilbur* v. *United States ex rel. Kadrie, supra*), and mandamus is thereby excluded. The case at hand differs in essentials from *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commn.*, 252 U. S. 178, where a specific, unequivocal command, removed after the decision by an amendment of the statute, was laid upon the Commission to value a particular thing, and the Commission ignored the command to the extent of refusing to hear any evidence whatever. The ruling in that suit has been explained in later cases, and confined to its peculiar facts. *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32, 35; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 311.

In *Hall* v. *Payne*, 254 U. S. 343, the Court speaking of the Act there in question and the Secretary of the Interior's construction of it, said (p. 348):

> * * * The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. * * *.

In the recent case of *Interstate Commerce Commission* v. *Campbell*, 289 U. S. 385, this Court said at page 393:

> * * * Errors of law in the discharge of a function essentially judicial are not sub-

> ject to be corrected through the writ of mandamus any more than errors of fact. * * *.

The opinion in the present case of the Court of Appeals for the District is very clear in its discussion of this phase. The Court said:

> * * * But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. * * *. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain lan-

> guage. * * *. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *L. & N. R. R.* v. *Mottley*, 219 U. S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. (R. 207–209.)

Under the authorities it is certain that there was no warrant for the issuance of the writ applied for by petitioners.

III

The Commission correctly construed the law in its application to the facts

We might well rest the case upon the points already discussed, but we think it well to consider the provisions of the statute to show the reasonableness and the correctness of the Commission's construction of them.

First, as to paragraph (4) of Section 3, set out in full, *supra*, p. 5.

The very language of the paragraph shows that the power which the statute imposed on the Commission was a compulsive power upon an unwilling

terminal owner to allow use of the terminal by another carrier, who desired but could not otherwise obtain use of the facilities.

The provisions for compensation and the method which are prescribed for fixing it all indicate that the allowance of the use by the owning carrier is involuntary. This is emphasized by the assimilation of the procedure in condemnation cases to the determination of compensation when the parties cannot agree on that matter, or are dissatisfied with the Commission's determination of the amount of compensation.

Plainly the proceeding contemplated is adversary in character and does not relate to a voluntary arrangement between the carriers.

The petitioners are not in such situation as to be entitled to the relief which they sought of the Commission. They are already using the terminal facilities, they have a contract or agreement voluntarily entered into years ago by which their right to occupy and use the terminal facilities was secured and by which they assumed obligations in consideration for the right so secured. Further, they, as pointed out by the Commission, are in the status of proprietors of the facilities, along with the ten other "proprietary companies." Thus, upon the facts, they did not bring themselves within Section 3 (4).

The Commission has construed this paragraph as applying to involuntary allowance of use. In

Hastings Commercial Club v. *Chicago, M. & St. P. Ry. Co.*, 69 I. C. C. 489 (decided July 10, 1922), it so held, (p. 493).

In *Long Island R. R. Co. Trackage*, 162 I. C. C. 218, the Long Island and the Pennsylvania had entered into an agreement for trackage rights into and use of the Pennsylvania's station at New York City by the Long Island. A certificate of public convenience and necessity for such operation, under Section 1 (18) of the Interstate Commerce Act was applied for and also an order of the Commission, under Section 3 (4), requiring the use of the tracks and facilities upon the terms already agreed to by the parties. The Commission dismissed the application under Section 3 (4), saying (p. 220):

> * * * As to section 3 (4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between

> the companies, the applicability of section 3 (4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3 (4) will therefore be dismissed. * * *.

The Commission's order was sustained in *Transit Commission* v. *United States,* 289 U. S. 121, although without discussion of this phase of the case.

The legislative history of the bill which became the Transportation Act also shows that Congress was providing for *compulsory* sharing of terminal facilities. House Report No. 456, 66th Congress, 1st Session; House Report No. 650, 66th Congress, 2nd Session.

No claim is now made that the Commission's authority to accord the relief petitioners seek comes within the purview of Section 15a (2), reliance being placed entirely on Section 3, paragraphs (1), (3) and (4). What the Commission said concerning the nonapplicability of Section 15a clearly disposes of that point. (R. 94–97, 104 I. C. C. at pp. 223, 224.)

The basis for the claim of discrimination, in support of which paragraphs (1) and (3) of Section 3 of the Act were brought forth, is that by the terms of the mutual agreement, the small users of the terminal are required to sustain the same burden as the

large users so far as the capital charges are concerned, one-twelfth of the interest on the bonds of the Terminal Company, and of the taxes and of the principal of the bonds; that that is undue prejudice and unjust discrimination within those provisions of the law because their use of the terminal facilities is less than the use thereof by other lines and that, if the Commission should hold that the Missouri-Kansas-Texas Railroad was entitled to an order under paragraph (4) of Section 3 and should fix a lesser compensation to be paid by said railroad for the use of the terminals than it was paying under the terms of the agreement, the difference would have to be assumed in equal shares by the remaining eleven proprietary companies, thereby aggravating the unjust discrimination. (R. 11, 12.)

Paragraphs (1) and (3) of the section are set forth, p. 5, *supra,* in full, and are summarized in what the Commission, in considering this claim of discrimination, said (R. 96, 104 I. C. C. at p. 224) as follows:

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Para-

graph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

It would seem that the above conclusions were indisputable. Through the terminal company, equally owned and controlled by them, each of the railroads hold equal equitable titles or interests in said terminal company's properties and, accordingly, each pays an equal share of the "capital charges." As to the user charges, the rate of charge is the same, the carriers paying in proportion to the use made of the facilities. No claim is made of discrimination in respect of the user charges.

It is also clear that the facts of the case do not show any violation of paragraph (3) of Section 3. There is no basis for the claim that there is any failure to furnish or afford "reasonable, proper, and equal facilities for the interchange of traffic," etc. Indeed, the operating agreement requires and provides that the use of such facilities as are available shall be furnished without discrimination. (See Article I, Sections 3, 4, and 5 of the Operating Agreement.)

And in Article III, Section 1, it is provided that the Terminal Company "shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities *and the use* and *enjoyment* thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply *equally* and *without discrimination* to all the Railway

Companies using the Terminal Facilities * * *." (Italics supplied.) (R. 36.)

Concerning the charges for maintenance and operating expenses, those charges are, as aforesaid, based on the respective uses made by the carriers of the terminal properties. It is the essentially capital charges, namely, those for taxes, interest and principal on bonds, equally distributed among the carriers on the basis of their equal equitable interests in the properties, with which we are concerned here.

Assume that the arrangement between the carriers had been for direct ownership, or ownership through a trustee, of the properties, each having an undivided one-twelfth legal, or equitable, title therein. Assume, too, that the charges for maintenance and operating expenses were, as here, based on the respective uses made by the carriers of the station and freight terminals. Whether paying for their said titles or interests in the properties out of the proceeds from sales of their stock or bonds or out of surplus, in one way or another each carrier would be meeting its share of the capital charges. In such case, however, it cannot be assumed that each carrier's share of the capital charges would be equal, for those carriers, having stronger credit, might have been able to secure the money at lower rate of interest or through sale of stock or other securities, not carrying fixed obligations as to interest or principal payments. By

contrast, in the present case it seems likely that the better credit of the stronger carriers materially aided to reduce "capital charges" which the weaker carriers might otherwise have had to meet to acquire and maintain their equal beneficial interest in the properties. It is recognized, of course, that carriers of strong credit and carriers of weak credit are not necessarily carriers which make greater and lesser users respectively of the terminal properties; but the above analogy serves as a partial illustration of the elements entering into contract obligations such as here involved.

It may be that it was unwise for certain of the carriers to have acquired an equal interest with the others in the properties. On the other hand, looking to possible increased price of terminal lands, anticipated growth of traffic and equality of competitive opportunity for such growth, it may have been wise policy. Doubtless there are many individual carriers, the cost of whose terminals, passenger and freight, are in excess of needs, but which were acquired and are being maintained for competitive reasons of one kind or another.

Petitioners urge in effect that the Commission's report shows that if it had the authority it would have undertaken to grant the relief asked. The statement to which reference is made reads as follows (R. 97):

> In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination

> by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and *adjustment of property interests.* The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions. (Italics supplied.)

We have underscored the words "adjustment of property interests" in order to make plain that the Commission, even in suggesting to the carriers voluntary revision of terminal arrangements, was not recommending changes in obligations for capital charges without corresponding change in property interests.

The order which is sought to be set aside was entered November 10, 1925, nearly eight years before this suit was filed; the petitions for rehearing were not filed until 1931, more than two years prior to the filing of the suit.

We call attention to the fact that a considerable amount of the bonds of the Kansas City Terminal Company was sold after the order of the Commission of November 10, 1925. (R. 240.) It may fairly be inferred that they were purchased on the faith of the Commission's decision and order and that the bondholders would be prejudiced if the constituent carriers were to have the privilege of withdrawing from their obligations in respect of the "capital charges", and prejudice would like-

wise result to the Kansas City Terminal Company. Furthermore, as petitioners show at page 8 of their brief, the Commission had held, under Section 3 (4), the Missouri-Kansas-Texas entitled to use of the terminal facilities and had continued the case for the purpose of determining the compensation which should be paid for that use. Such hearing and decision has been had. (198 I. C. C. 4.) In that report, the Commission repudiated the "user" bases for apportioning interest and taxes and holds that the unit or numerical basis is the fair basis. The Commission said:

> Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property. * * *.
>
> The user basis as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and in our opinion does

not afford a just and reasonable basis. We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied.

(Id. 9–11.)

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia, sustaining the action of the trial court in dismissing the petition for a writ of mandamus, was correct and should be affirmed.

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